IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.2761 OF 2002

IN

SUIT NO.1049 OF 1997

Corporate Courier Ltd. ... Plaintiffs

v/s

Viral Enterprises and others ... Defendants

And

Camoran Finance and Investment and anr. ... Respondents

Mr Sudeep Sen i/b M/s M.M. Patel and Co. for Plaintiffs.

Mr A. Ankhad for Defendant No.1.

CORAM : D.K.DESHMUKH J.

DATE : 26TH AUGUST 2004

P.C.: -

1. This is a notice of motion taken out by the plaintiffs. By this notice of motion, the interim order declaring that the amount of Rs.4,10,000/-, which the plaintiffs have paid to defendant Nos.1 to 5, is a charge on the land. The plaintiffs have filed the suit for a decree of declaration that the memorandum of understanding dated 30th November 1994 is binding on the defendants. He also seeks a decree of specific performance of the contract. In the alternative, the plaintiffs seek an order for refund of the amount paid by the plaintiffs to the defendants. The learned counsel appearing for plaintiffs, at the outset, stated before me that the plaintiffs would no longer insist on a decree for specific performance of the memorandum of understanding, he wants refund of money to which, according to the plaintiffs, they are entitled because of provisions of section 8 of the Maharashtra Ownership of Flats Act 1963. It appears that during the pendency of the suit, the property has been sold in execution of decree to defendant No.6, but the sale is on 'As is where is' basis and therefore, according to the plaintiffs, the said sale is subject to the liability of

the plaintiffs. The plaintiffs submit that section 8 of the Maharashtra Ownership of Flats Act in terms lays down that if a person has paid amount to the promoter for securing accommodation and if that flat is not made available by the promoter to the person, then the person becomes entitled for refund of amount and the land on which the building was to be constructed becomes subject to the charge for the amount paid by the person to the promoter. The defence of the defendant No.6 appears to be that initially in the year 1994, the property was mortgaged by the defendant Nos.1 to 5 in favour of Canara Bank and the defendant No.6 paid the amount due to Canara Bank from the owners and the defendant No.6 steps into the shoes of Canara Bank. However, though these averments are made in the affidavit filed in reply to this motion, the document of mortgage in favour of Canara Bank is neither produced nor leave of the Court is sought to rely on that document. Similar is the case with the finance agreement which is alleged to have been entered into between the defendant No.6 and the owners of the land. For the purpose of understanding the case of the plaintiffs, it is necessary to refer to the provisions of section 8 of the Maharashtra Ownership of Flats Act 1963 which read thus :-

"8. Refund of amount paid with interest for

failure to give possession within specified time or further time allowed, if

(a) the promoter fails to give possession in accordance with the terms of the agreement of a flat duly completed by the date specified, or any further date or dates agreed to by the parties, or

(b) the promoter for reasons beyond his control and of his agents, is unable to give possession of the flat by the date specified, or the further agreed date and a period of three months thereafter, or a further period of three months if those reasons still exist,

then, in any such case, the promoter shall be liable on demand (but without prejudice to any other remedies to which he may be liable) to refund the amounts already received by him in respect of the flat (with simple interest at nine per cent per annum from the date he received the sums till the date the amounts and interest thereon is refunded), and the amounts and the interest shall be a charge on the land and the construction if any thereon

in which the flat is or was to be constructed, to the extent of the amount due, but subject to any prior encumbrances."

. Perusal of the above quoted provision shows firstly that on failure of the promoter to give possession of the flat by the specified date, the person who has booked the flat becomes entitled for refund of money with interest and the amount becomes entitled to be charged on the land, but such charge is subject to prior encumbrances. Obviously therefore, had the defendant No.6 been in a position to establish that there was a prior encumbrance in favour of defendant No.6, then probably by operation of section 8, charge may not be created on the land in favour of the plaintiffs, but as stated above, the defendant No.6 has chosen not to produce the document by which prior encumbrance was created on the land. Going by the record as it stands today and also considering the ad-interim order which is granted by the Supreme Court, in my opinion, it would be appropriate to grant interim order in the same terms in which it has been granted by the Supreme Court. Notice of motion is therefore disposed off in following terms.

2. The defendants are restrained from disposing

off or alienating, transferring or creating third party rights in the property described in Exh.A-1 to the plaint until further orders of this Court. Notice of motion is disposed off.

. Parties to act on the copy of this order duly authenticated by the Associate / Personal Secretary as true copy.

. Certified copy expedited.